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No. 89-1882

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

TOM FOLEY,

Petitioner,

v.

WCCO TELEVISION, INC., A CORPORATION, STEVE ECKERT, JOHN LINDSAY,

Respondents.

On Petition For A Writ of Certiorari to the Supreme Court of Minnesota

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the Minnesota Court of Appeals that certain statements in the broadcasts at issue were not defamatory as a matter of law raises any special and important issues of federal constitutional law that this Court should review.

2. Whether in this public official defamation case the Minnesota Court of Appeals' exercise of its independent review function to affirm the trial court's grant of summary judgment on the ground that Petitioner had not presented evidence which could support a reasonable jury finding of actual malice by clear and convincing evidence raises federal constitutional issues calling for the exercise of this Court's supervisory powers.

RULE 29.1 STATEMENT

Midwest Communications, Inc. is the parent of Respondent WCCO-Television, Inc. Respondent WCCO-Television, Inc. has no subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.1 STATEMENT ii

REFERENCE TO OPINIONS v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The decision of the Minnesota Court of Appeals that certain statements were not defamatory as a matter of law does not raise certworthy federal constitutional issues 3

II. The Minnesota Court of Appeals' exercise of its independent review function to affirm summary judgment on the ground that Petitioner had not presented evidence which could support a reasonable jury finding of actual malice by clear and convincing evidence raises no constitutional issues calling for exercise of this Court's supervisory powers 5

CONCLUSION 9

APPENDIX A-1

TABLE OF AUTHORITIES

CASES:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 6

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 6, 7

Capan v. Daugherty, 402 N.W.2d 561 (Minn. Ct. App. 1987) 3, 4

Diesen v. Hessburg, ____ N.W.2d ___, 1990 W.L. 59568 (Minn.) 3, 4

Foley v. WCCO Television, Inc., 449 N.W.2d 497 (Minn. Ct. App. 1989), *pet. for rev. denied* (Minn. Feb. 9, 1990) 2, 3, 4 7, 8

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) . . 4

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. ___, 109 S. Ct. 2678 (1989) 6, 7, 8

Herb v. Pitcairn, 324 U.S. 117 (1945) 8

Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986) . . . 3, 4

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 5

Ross v. Moffit, 417 U.S. 600 (1974) 3

MISCELLANEOUS:

Minnesota Rule of Civil Appellate Procedure 117 2

United States Supreme Court Rule 15.1 3

REFERENCE TO OPINIONS

The March 16, 1988 Order and Memorandum of the Minnesota District Court for the Fourth Judicial District are not reported but are reproduced in Appendices D & E to the Petition.

Because the Minnesota District Court's January 20, 1989 Order and Memorandum are not included with the Petition, they are reproduced in the Appendix to this Brief in Opposition.

The Minnesota District Court's April 5, 1989 Order and Memorandum are reproduced in Appendix F to the Petition.

The opinion of the Minnesota Court of Appeals, dated December 26, 1989, is reported at 449 N.W.2d 497 and is reproduced in Appendix C to the Petition.

The Order of the Minnesota Supreme Court denying review of the decision of the Court of Appeals is dated February 9, 1990. It is not reported but is reproduced in Appendix A to the Petition.

IN THE SUPREME COURT OF THE UNITED STATES

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On Petition For A Writ of Certiorari to the Supreme Court of Minnesota

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The opinions of the Minnesota Court of Appeals and the Minnesota District Court, Fourth Judicial District, correctly and concisely state the relevant facts underlying the case and the decisions. We will, however, add here a brief recitation of the somewhat convoluted procedural history of the case.

In 1986, Respondent WCCO-TV broadcast several reports about the official investigation into the death of a local woman. The report was generally critical of all public

agencies and officials involved in the case. Petitioner, the County Attorney for Ramsey County, brought suit claiming that virtually every word in that broadcast libeled him. The Minnesota courts eventually ruled on 197 allegations of defamation. *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 500 (Minn. Ct. App. 1989), *pet. for rev. denied* (Minn. Feb. 9, 1990).

The majority of Petitioner's allegations were dismissed by the trial court in March 1988 for failure to state a claim upon which relief could be granted. Petition for Writ of Certiorari, Appendix D.[1] In January 1989, the trial court granted summary judgment for Respondents as to Petitioner's remaining allegations on the ground that Petitioner had not brought forth evidence that would support a reasonable jury finding of actual malice by clear and convincing evidence. Resp. App. at A-1. After additional submissions from the parties on the issue of actual malice, the trial court entered its final order dismissing the case in April 1989. Pet. App. at F-1. Petitioner took an appeal as of right to the Minnesota Court of Appeals which affirmed the judgment below in December 1989. *Foley v. WCCO Television, Inc., supra.* Petitioner sought discretionary review from the Minnesota Supreme Court, which was denied on February 9, 1990.[2] Pet. App. at A-1.

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1. References to the Appendix to the Petition for Writ of Certiorari will be cited hereafter as "Pet. App. at ____." References to the Appendix to this Brief in Opposition will be cited as "Resp. App. at ___."

2. Under Rule 117 of the Minnesota Rules of Civil Appellate Procedure, the criteria the Supreme Court may consider in determining whether to grant review include the importance of the question presented, whether the lower court has ruled in a manner that calls for exercise of the Supreme Court's supervisory powers, whether the constitutionality of a statute is at issue, or whether a decision by the Supreme Court would help "develop, clarify, or harmonize the law." *Id.* at Subd. 2.

REASONS FOR DENYING THE WRIT

I. The decision of the Minnesota Court of Appeals that certain statements were not defamatory as a matter of law does not raise certworthy federal constitutional issues.

The Minnesota Court of Appeals held that many of Petitioner's allegations of defamation failed to state a claim because the facts reported were true, and any questions raised were matters of opinion and legitimate criticism of public officials. *Foley v. WCCO Television, Inc.*, 449 N.W.2d at 500-01.[3] Although Petitioner urges that the Court of Appeals was wrong for several reasons, and clearly wishes for a different result, he has not presented for this Court's consideration any new or unusual federal constitutional issues. *See Ross v. Moffit*, 417 U.S. 600, 616-17 (1974).

The focus of Petitioner's argument is on the Court of Appeals' ruling that certain statements, which it held to be opinions, could not be defamatory. This holding relies on both state and federal precedent, applying the fact/opinion test from the Eighth Circuit's decision in *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986), which had in turn been adopted by the Minnesota Court of Appeals in *Capan v. Daugherty*, 402 N.W.2d 561 (Minn. Ct. App. 1987). In *Diesen v. Hessburg*, ____ N.W.2d ____, 1990 W.L. 59568 (Minn.), another defamation case brought by a county attorney, the Minnesota Supreme Court also adopted the *Janklow* test.

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3. Petitioner asserts that the broadcasts at issue included a statement that he knew that a campaign contributor "was a potential suspect, yet took money from him at least two times after. There is something there." Petition at 16. In accord with Rule 15.1, United States Supreme Court Rules, we point out that Respondents' broadcasts contained no such statement, as evidenced by the scripts and videotape which were part of the record before the Minnesota Court of Appeals.

There, in upholding a JNOV in favor of the newspaper defendant (and reversing a decision of the Court of Appeals in the plaintiff's favor), the Court stated:

> We reiterate that like protected opinion and "fair comment" on public officials, "[t]he doctrine of privileged communication rests upon public policy considerations [and] results from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory." ... Thus, while first amendment and other policy considerations underlie this restraint, we note our decision here is rooted in state defamation law.

Diesen v. Hessburg, supra (citations omitted).

On the opinion/fair comment issue, Petitioner does not question the principle that "[u]nder the first amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). He does not quarrel with the fact/opinion test set out in *Janklow* and adopted by the Minnesota courts in *Diesen* and *Capan*. He does not suggest that Minnesota's analogous common law privilege of fair comment is constitutionally invalid. Instead, he asserts that in applying the law to his case, the Minnesota courts "ignored" certain facts, allegedly left out of Respondents' broadcasts which, in his view, should have led to a different result. This contention is incorrect. The Minnesota Court of Appeals did not ignore Petitioner's contentions regarding omitted facts. Rather, the court held that they were meritless.

> In this case, Foley has not pleaded, nor does the record reveal, any additional material facts that the I-Team knowingly omitted which would have removed the allegedly defamatory tone of their broadcasts.

Foley v. WCCO Television, Inc., 449 N.W.2d at 502.

More important, by limiting his argument on the opinion/fair comment issue to the purported incorrectness of the result in this case, Petitioner fails to demonstrate any special or important issue of general application that would merit this Court's review.

II. The Minnesota Court of Appeals' exercise of its independent review function to affirm summary judgment on the ground that Petitioner had not presented evidence which could support a reasonable jury finding of actual malice by clear and convincing evidence raises no constitutional issues calling for exercise of this Court's supervisory powers.

The Court of Appeals' decision affirming the trial court's grant of summary judgment brought together three issues which arise in most public official defamation cases. The first, the definition of actual malice, has long been settled. In a defamation suit brought by a public official,[4] the first amendment requires the plaintiff to prove that the defendant published the defamatory statement with actual malice, that is "with knowledge that it was false or with reckless disregard to whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254, 278-80 (1964). The plaintiff is required to prove actual malice with "convincing clarity." *Id.* at 285-86. Most recently, this Court affirmed that actual malice

> requires at a minimum that the statements were made with a reckless disregard for the truth. And although the concept of "reckless disregard" "cannot be fully encompassed in one infallible definition," *St. Amant v. Thompson,* 390 U.S. 727, 730, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), we have made

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4. Both parties agree that Petitioner, the Ramsey County attorney, is a public official. Petition at 10.

> clear that the defendant must have made the false publication with a "high degree of awareness of ... probable falsity," *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964), or must have "entertained serious doubts as to the truth of his publication," *St. Amant, supra,* 390 U.S. at 731, 88 S.Ct. at 1325.

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. ___, 109 S.Ct. 2678, 2685-86 (1989).

The second issue underlying the grant of summary judgment and the subsequent affirmance by the Court of Appeals is the non-moving party's burden of proof in resisting a motion for summary judgment. In *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255-56 (1986), this Court stated that the test is whether the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence. Petitioner does not dispute that *Anderson* set the standard by which the Court of Appeals was required to measure the propriety of the summary judgment in Respondents' favor.

Finally, the Court of Appeals was bound to, and did, follow this Court's direction to conduct an independent review of the record concerning proof of actual malice. *Harte-Hanks Communications, Inc. v. Connaughton, supra; Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485 (1984).

> Upon independent review of the record, we find that WCCO-TV investigated this matter by reviewing public documents and interviewing the public officials and private citizens involved in this case. The record is devoid of evidence that WCCO-TV broadcasted its report knowing that the information was false or that WCCO-TV entertained serious doubts as to the truth of its publication; therefore, we conclude that summary judgment is proper in the absence

> of any issues of material facts relating to actual malice.

Foley v. WCCO Television, Inc., 449 N.W.2d at 504.[5]

Petitioner urges that a writ of certiorari should be granted to review the Court of Appeals' decision on actual malice because "this Court has never stated precisely what is required in a judicial opinion when there is a public figure suing for damages from defamation broadcast by media defendants." Petition at 11-12. This contention does not make clear exactly what action Petitioner wishes this Court to take here, or how he claims the Court of Appeals erred in conducting its independent review.

Certainly this Court's decisions in *Harte-Hanks* and *Bose* instructed the lower courts on the standards to apply in conducting an independent review, directions followed in this case. Petitioner appears less to challenge what the Court of Appeals actually did than to suggest that this Court should grant a writ of certiorari in order to revise the Court of Appeals' opinion. This Court long ago declined to undertake such a task:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our

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5. The trial court was even more emphatic in its ruling on Petitioner's failure to meet his burden of proof on actual malice.

> The court has carefully reviewed the record before it, and the record is bare of any evidence sufficient to support a jury conclusion of actual malice. On the contrary, the evidence before the court affirmatively disproves any claim of actual malice.

Resp. App. at A-12.

> power is to correct wrong judgments, not to revise opinions.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

The opinion of the Court of Appeals does not, in any event, require revision. It demonstrates a careful analysis of the record and details at length the facts underlying each part of the ruling. Moreover, independent review in this case was less complicated than in a case such as *Harte-Hanks* which came to this Court after a jury trial, and required review of a record with competing, and likely contradictory, evidence from each side. Here the record was almost entirely created by Petitioner. Excepting videotape and scripts of the broadcasts, videotape of one interview, and the audio tape of a telephone conversation,[6] the record before the Minnesota courts consisted of affidavits and other statements submitted by Petitioner and several depositions taken by Petitioner's counsel.[7] Petitioner himself had moved for summary judgment, signaling that his evidence was complete. Resp. App. at A-2. He simply failed, on the facts of his case, to muster the clear and convincing evidence necessary to support a reasonable jury finding that Respondents acted with actual malice. Under the principles established by this Court's decisions, summary judgment in favor of Respondents was required.

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6. Petitioner did not dispute the accuracy of the non-party statements recorded on the video and audio tapes.

7. In describing the record, the Court of Appeals referred to "affidavits of ... I-Team reporters Steve Eckert and John Lindsay." *Foley v. WCCO Television, Inc.*, 449 N.W.2d at 503. This is incorrect. Respondents did not submit affidavits from Eckert and Lindsay on the motion for summary judgment. The court was apparently referring to their depositions, which were part of the record and were cited in the motion.

CONCLUSION

The decisions below are the product of a thoughtful application of this Court's rulings in public figure defamation cases. Petitioner does not challenge the basic standards under which his case was judged. Nor does he demonstrate that his case presents any new or yet undecided issues in applying those standards. Having failed to persuade three Minnesota courts that he had a triable case, Petitioner now asks this Court to read the facts anew and give him a different result. For all the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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June 7, 1990

APPENDIX

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

Tom Foley,

Plaintiff,

vs.

ORDER

File No. 87-4560

WCCO T.V., Inc., a corporation,
Steve Eckert, and John Lindsay,

Defendants.

Plaintiff's motions for discovery and cross-motions for summary judgment in regard to the above-entitled matter came on for hearing before the undersigned, one of the judges of the above-named Court, on November 17, 1988.

Patrick Foley, Esq., appeared on behalf of the plaintiff. Paul Hannah, Esq., and Paula Osborn, Esq., appeared on behalf of the defendants.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED:

1.That defendants' motion for summary judgment is granted.

2.That plaintiff's motion for summary judgment is denied.

3. That all other motions are denied as moot.

ORDER FOR JUDGMENT

IT IS HEREBY ORDERED that defendants have judgment on plaintiff's complaint, together with their costs and disbursements.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: /s/ January 20, 1989 /s/ Robert G. Schiefelbein
Robert G. Schiefelbein

MEMORANDUM

FACTS

This matter is currently before the court on the cross-motions of the parties for summary judgment pursuant to Rule 56 of the Minnesota Rules of Civil Procedure.

This action was commenced by Ramsey County Attorney Tom Foley following a series of broadcast reports by Defendant WCCO Television, Inc., concerning the Kathleen Greening murder investigation. Several of plaintiff's claims were dismissed by the court by order dated March 16, 1988. Plaintiff approached summary judgment with one remaining claim which grows out of defendant's broadcast of reports about interactions between the Ramsey County Attorney's office and the Ramsey County Medical Examiner's office.

Kathleen Greening was a Lauderdale, Minnesota woman who was found dead in her home in 1982. Carol Kellogg, a close friend of the decedent, discovered Greening's body in the bathtub of her home with her head under water. The circumstances surrounding Greening's death, the large majority of which are irrelevant to matters now before the court, caused Kellogg to conclude that her friend had been the victim of homicide.

Dr. Michael McGee of the Ramsey County Medical Examiner's office conducted an autopsy. McGee listed the official cause of Greening's death as "undetermined." An investigation into the circumstances surrounding Greening's death was conducted by the Roseville Police Department, headed by Investigator Bill Lunzer. Ms. Kellogg and the family of the victim believed that Greening was murdered. Kellogg, especially, pressed for answers. By the fall of 1985, Dr. McGee had made up his mind to change the manner of death designation on Kathleen Greening's death certificate from "undetermined" to "homicide." (McGee Depo. at 46).

Kathleen Greening's estranged husband was apparently considered a potential suspect in the case. Mr. Greening was a partner in the St. Paul law firm of Briggs and Morgan. Both Mr. Greening and other members of the firm had made political contributions to Tom Foley during his reelection campaign.

Charles W. Balck was an attorney in the criminal division of the Ramsey County Attorney's office. Sometime during late October or early November, 1985, at about the same time that Dr. McGee was considering changing Greening's death certificate, Tom Foley asked Balck to review the Greening file. After his review, Balck and Foley met and discussed the matter. Balck told Foley that even if the manner of death was changed by the Medical Examiner he did not feel there was sufficient evidence to go forward with the charges. (Aff. of Charles M. Balck, 4/23/87).

Foley told Balck that in the event the death certificate was changed, the matter would be referred out of the Ramsey County Attorney's office because of rumors that Greening's husband and the law firm of Briggs and Morgan had contributed to his reelection campaign committee. "Mr. Foley informed me that he had received campaign contributions from attorneys in that law firm and wanted to avoid any potential conflict of interest." (Aff. of Charles M. Balck, 4/23/87).

On or about November 5, 1985, Mr. Balck met with Dr. McGee in the Medical Examiner's office. Also present

were James Essling, an investigator from the Medical Examiner's office and representatives from the Roseville Police Department. According to Charles Balck, the purpose of the meeting was to review the Greening file and to discuss the "ramifications" of changing the manner of death from "undetermined" to "homicide." (Balck Aff.). Mr. Balck recalls that:

> At the end of the meeting, I stated that based on the facts as they existed, even if the death certificate were changed to a homicide I was still of the opinion that the case could noL- be charged at that time. I did state that if this case were forced to go to the grand jury and subsequently charged I did not feel that it had much chance of successful prosecution, and, in the event that new evidence would become available after an unsuccessful prosecution, this case could by law not be recharged.

Balck Aff.

As noted above, James Essling was an investigator with the Ramsey County Medical Examiner's office who was present at the November 5th meeting with Balck and Dr. McGee. On February 17, 1986, Carol Kellogg spoke with Essling by phone. Unbeknown to Essling, Kellogg tape - recorded their conversation. Steve Eckert listened to this tape, as well as others, sometime before his interview with Dr. Michael McGee and before WCCO Television broadcast the news reports which are the subject of this action. (Eckert Depo. at 68). Excerpts of this taped conversation between Kellogg and Essling are as follows:

> Kellogg: Oh, you had a meeting with the county attorney?
>
> Essling: Oh I told you that. Come on, come on.
>
> * * *
>
> Essling: One after that too.

Kellogg: Huh?

Essling: And finally we just said ...

Kellogg: You had one after?

Essling: Sure.

Kellogg: And what was decided on the meeting after?

Essling: He asked us not to.

Kellogg: The county attorney asked you not to?

Essling: Urn hum.

Kellogg: Why?

Essling: Because they couldn't take the guy to the Grand Jury. * * * They left (unintelligible) and I said, well, Doc, what are we going to do now; he said, I don't know Jim. Do you want to go to war; and I said, well, I'm ready. So I guess we're ready to go (to] war and that's what's going to happen.

* * *

Kellogg: Well he [Foley] got John [Samuelson] [an investigator from the Attorney General's office] off the case, didn't he?

Essling: Yes he did. I think so. I'm not sure of that though. When I talked to his boss on the phone and I put the thing on speaker and we had it through the whole office, so the investigators could hear too. You should...this, I'm nct knocking the guy, but it was, it had overtones of something. It was right after Foley had told me he was going to tell them to go run with it. And then the file is back in my office and the guy calls me, so I know something is screwy. McGee looked at me and he said, "He's covering it up, Jim."

McGee said that to me. I said, Ah, Doc, come on. He's too smart. Political animal. He knows he's not going to get us ....

* * *

Kellogg: You called that meeting?

Essling: I called it to tell them we were going to do it.

Kellogg: And you told me that a half hour before we came in for our meeting you found out that McGee had changed his mind.

Essling: That was before the other meeting was.

Kellogg: Oh, I see.

Essling: And they came in and sat down, please don't do it, you know. It won't do us any good.

Kellogg: Who said that? Bill [Lunzer] said that?

Essling: No, the county attorney.

On February 16, 1986, Steve Eckert interviewed Dr. McGee about the Greening investigation. During the interview, Dr. McGee made the following statement, which was broadcast on February 27, 1986, and at other times as well.

... and so we've tried to cooperate with them in that regard and have essentially done what they've asked us.

* * *

They've asked us at this time to hold the death certificate in the position it is right now until they can explore further examination they have to do.

In various reports Mr. Eckert has allegedly said that McGee had not changed the death certificate "at the request of the Ramsey County Attorney's office"; "because of meetings with representatives of the Ramsey County Attorney's office"; and as a result of "opposition from the Ramsey County Attorney's office." The defendants have also allegedly reported that "Foley" had told the Medical Examiner's office not to change the death certificate. Other reports of the same nature were alleged to have been broadcast as well.

On February 27, 1986, the Medical Examiner's office announced that it had changed the manner of death on the Greening death certificate from "undetermined" to "homicide." Tom Foley held a press conference on that day announcing that the case would be transferred to the Anoka County Attorney's office. Foley stated, in essence, that there had been no wrongdoing by his office. This statement was also broadcast by WCCO Television.

Although the court notes that plaintiff has a number of discovery motions pending at this time, the plaintiff, as well as the defendant, has moved for summary judgment. Plaintiff has filed no memorandum in opposition to defendant's motion. The court specifically notes that plaintiff has attempted to make no showing pursuant to Rule 56.06 Minn.R.Civ.P., that he needs to conduct additional discovery in order to resist defendant's motion for summary judgment.

DISCUSSION

"In libel cases a publication may be defamatory on its face or it may carry a defamatory meaning only by reason of extrinsic circumstances. The question whether a claimed defamatory innuendo is reasonably conveyed by the language used is for the court to determine." *Utecht v. Shopko Department Store*, 324 N.W.2d 652, 653 (Minn. 1982). This court has previously determined that the statements attributed to defendants which relate to the interaction of Foley and his office with the Medical Examiner's office are capable of a defamatory meaning. *See*, Order and Memorandum, March 16, 1988, at 18-19. When a court finds

that words are capable of a defamatory meaning, it is then for the jury to determine whether a defamatory message was in fact conveyed by them. *Utecht,* 324 N.W.2d at 653. In considering defendant's motion for summary judgment, the plaintiff is entitled to the view of the evidence most favorable to him. *Ritter v. M.A. Mortenson Co.,* 352 N.W.2d 110 (Minn. 1984). In this defamation action, viewing defendants' alleged statements in the light most favorable to plaintiff's case means viewing them in the light most damaging to his reputation.

Plaintiff asserts that the "innuendo"; or the defamatory meaning which the defendant's statements actually conveyed, was that Tom Foley acted or exerted influence to prevent the Medical Examiner's office from changing the death certificate because a campaign contributor was a suspect in the case.

It is the defendants' argument that the evidence now before the court is insufficient as a matter of law to support a finding of libel under the *New York Times v. Sullivan* actual malice standard. Thus, considering plaintiff's contentions as to the "sting" of the article as established for the purposes of analysis, a new question emerges. That question is whether there is any issue of material fact as to actual malice under the *New York Times* standard; even assuming that the factual issue as to the meaning or "innuendo" of defendant's reports was resolved favorably to plaintiff's action.

The plaintiff, as Ramsey County Attorney, is a public official. The defendants, WCCO Television, Inc., and reporters Steve Eckert and John Lindsay, are "media." Accordingly, this case is governed by the standard announced in *New York Times v. Sullivan,* 376 U.S. 254 (1964). In 1985 Justice White, writing for the Court, observed that "we held [in *New York Times*] that in a libel suit brought by a public official the First Amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice -- with knowledge that it was false or with reckless disregard of whether it was false or not. We held further that actual malice must be shown with

"convincing clarity." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1985).

In *Anderson* the Court confronted the question of "whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies." Reasoning that a trial judge must "view the evidence presented through the prism of the substantive evidentiary burden," the Court concluded that:

Where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge s summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Id. at 254-56. *See, Price v. Viking Penguin, Inc.*, 676 F.Supp. 1501 (D.Minn. 1988) ("[t]he heightened evidentiary requirement applicable to proof of actual malice -- that is, by clear and convincing evidence must be applied in summary judgment motions." (citing *Anderson*)).

The high costs which attend defending against even an ill-fated defamation action may very well have a chilling effect on the media. Accordingly, summary judgment should be granted in such actions when appropriate. *Schiavone Construction Co. v. Time, Inc.*, 619 F.Supp. 684 (D.N.J. 1985).

The Minnesota case which comes closest to providing guidance on the appropriate summary judgment standard is

Jadwin v. Minneapolis Star and Tribune Co., 367 N.W.2d 476 (Minn. 1985). The *Jadwin* court stated that "[a] genuine issue of fact as to actual malice exists only if the facts permit the conclusion that the defendants in fact entertained serious doubts as to the truth of the publication." *Id.* at 488. Jadwin was decided before *Anderson.* Thus, the fact that *Jadwin* does not explicitly incorporate the clear-and-convincing standard does not signal any departure by our own state court or intent to depart from the standard for summary judgment set forth by the Supreme Court in *Anderson.*

The requirement that actual malice must be shown with "convincing clarity" was announced by the court in *New York Times v. Sullivan*[1], 376 U.S. 254, 285-86. "The Court has since amplified the evidentiary standard for actual malice. The 'reckless disregard' standard means that there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Price v. Viking Press,* 676 F.Supp. 1501 (D.Minn. 1988) (citing *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968). *See also, Jadwin v. Minneapolis Star and Tribune Co.,* 367 N.W.2d 476 (Minn. 1985) ("serious doubts" as to truth of publication).

The present inquiry is whether either party is entitled to summary judgment. Because the court concludes that the defendants are entitled to judgment as a matter of law, the merits of plaintiff's own motion for summary judgment are touched upon but briefly.

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1. July Instruction Guide No. 707 (2d Ed. 1986) has formulated the jury instruction on clear and convincing evidence thusly: "When I say clear and convincing evidence, I mean that the evidence must lead you to conclude that it is highly probable that the defendant published the statement with actual malice. Put another way, the evidence must produce in your minds a firm belief or conviction that the defendant published the statement with actual malice."

Plaintiff argues at some length that malice in this case is to be found in the defendants' failure to ask the "right questions" which would have uncovered the ultimate or "real" truth. Furthermore, it is plaintiff's contention that a full and thorough exposé of all of the facts surrounding the murder investigation would make up a story that is not harmful to plaintiff's reputation.

In *Schiavone Construction Co. v. Time, Inc.*, 619 F.Supp. 684 (D.N.J. 1985) the defendant quoted part of an FBI memorandum about plaintiff but did not publish a concluding statement of the memo which indicated that plaintiff was not involved in any criminal activity. Quite simply, plaintiff has pointed to no such examples in the instant case where defendants have omitted key passages of text which alter the import of a particular speaker's or writer's message.

Nor is it required of a reporter that he leave "no stone unturned."

The qualified immunity of *New York Times* protects the press against a public official's libel action based on lack of thoroughness or predisposition as long as the defendant is not shown to have published recklessly or in the belief that its assertions were false. It is difficult to conceive of an investigation conducted in so thorough a fashion that it would not be vulnerable to after-the-fact charges of inadequacy.

Westmoreland v. CBS, Inc., 596 F.Supp. 1170 (S.D.N.Y. 1984). *See also, Valents v. Ulrich*, 402 N.W.2d 809, 813 (Minn. Ct. App. 1987) ("Failure to make reasonable investigation is insufficient to show actual malice.").

The investigation which defendants conducted in this case was apparently not so thorough as to not be subject to "after-the-fact charges of inadequacy." The fact of the matter is, however, that plaintiff has pointed to no evidence in the

record from which a jury could conclude that defendants missed the truth because of their recklessness.

Plaintiff also urges that his own denials of any wrongdoing should somehow factor in to establishing the benchmark of truth against which defendant's reckless disregard can be measured. The Second Circuit has held that

> Surely liability under the "clear and convincing proof" standard of *New York Times v. Sullivan* cannot be predicated on mere denials, however vehement, such denials are so commonplace in the world of polemical charge and countercharges that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.

Edwards v. National Audobon Society, Inc., 556 F.2d 113, 121 (1977), U.S. *cert. den.*, 434 U.S. 1002.

Assuming that WCCO reported that Foley and his office had acted to keep Dr. McGee from changing the Greening death certificate, the question is whether there is evidence from which a reasonable jury could conclude, applying the clear-and-convincing standard, that defendants knew the reports were false or entertained serious doubts as to their truth.

The court has carefully reviewed the record before it, and the record is bare of any evidence sufficient to support a jury conclusion of actual malice. On the contrary, the evidence before the court affirmatively disproves any claim of actual malice.

At the time the news reports were first aired, Steve Eckert had already listened to tape recordings of Carol Kellogg's phone conversations with James Essling. Essling's statements suggest involvement by the office of the County Attorney as well as the County Attorney himself in keeping the Greening death classified as "undetermined."

Reliance on an apparently trustworthy source chips away at the very heart of a claim of actual malice. *See, Speer v. Ottoway Newspapers, Inc.*, 828 F.2d 475 (8th Cir. 1987) U.S. *cert. denied*, 108 S. Ct. 1247. Where there is no reason for a reporter to doubt the truth of a source's statements, reliance upon such statements goes to disprove a claim of actual malice. *Hall v. Rogers*, 490 A.2d 502 (R.I. 1985) (affirming grant of summary judgment). In this case there was no reason for Eckert to doubt the truth of Essling's statements to Kellogg. Essling was in a position to know what the facts surrounding interactions between his office and the County Attorney's office were. And there was no motive, apparent or otherwise, for Essling to lie to Kellogg. Armed with knowledge of Essling's statements, it cannot be concluded at all, much less by clear and convincing evidence, that Eckert had serious doubts about the alleged "sting" of his report.

Similarly, Mr. Eckert interviewed Dr. Michael McGee on February 26, 1986, the day before the alleged libel was broadcast. McGee stated during the interview that "[t]hey've asked us to hold the death certificate in the position it is right now...." According to plaintiff, the sting of publishing this statement by McGee is that it inaccurately portrays the involvement of Foley and his office with the Medical Examiner's office. Plaintiff contends that what Dr. McGee meant was that the request to hold the death certificate in the "undetermined" status was at the behest of the Roseville Police Department as well as the County Attorney's office. Yet according to even McGee, his reference to "they" included the County Attorney's office. (McGee Depo. at 92). Broadcasting McGee's statement, even in a context which focuses on the involvement of the County Attorney and his office, is by no means a knowing or reckless disregard for the truth.

CONCLUSION

The issue of whether the statements made by the defendants convey a defamatory meaning is a question for the jury. However, even if the jury were to resolve that issue favorably to the plaintiff, there is no evidence from which a

jury could conclude, by the clear and convincing standard, that the defendants have acted with actual malice. Accordingly, summary judgment for the defendants is proper.

The observations of Judge Murphy in *Price v. Viking Penguin, Inc.*, 676 F.Supp. 1501 (D.Minn. 1988) seem particularly applicable in the instant case:

> This litigation has gone on a long time. Plaintiff has had ample opportunity for discovery and to establish an actionable case, but defendants have shown they are now entitled to summary judgment. Plaintiff appears from time to time in this court as a dedicated public servant and is understandably distressed.... But it is not for this court to balance his distress with the right to freedom of speech vigorously asserted by defendants. The Supreme Court has already struck that balance with respect to public officials, and in the absence of clear and convincing evidence of actual malice with respect to a statement of fact concerning plaintiff, the balance tips in favor of free speech.

This court concludes that defendants are not to be held civilly liable for their news reports. This does not in any sense mean that Tom Foley has conducted himself or the affairs of his office inappropriately. In the final analysis, the ultimate truth may very well be that Mr. Foley has acted in accordance with the highest notions of ethical behavior. Yet this court's focus has not been on the issue of the "ultimate truth."

The media is given a certain leeway in reporting on the affairs of public figures. Although not every cloud of smoke necessarily means a fire is burning, it is probably fair to say that the media may not be held liable for reporting the fact of fire from the presence of smoke. This court has attempted to measure how far, if at all, defendants' reports have strayed from the facts -- as these facts were known to the defendants.

This court does not conclude the reports of the defendants were true. This court only concludes that in reporting as they did, defendants did not recklessly cast truth by the wayside.

Defendants' motion for summary judgment dismissing plaintiff's complaint is granted.

LET THIS MEMORANDUM BE MADE PART OF THE FOREGOING ORDER.

R.G.S.